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No. 92-570

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALFRED C. SHARPTON,

Petitioner,

vs.

HON. JOHN G. TURNER, JR., Albany County Judge; ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents the Hon. John G. Turner, Albany County Judge and Robert Abrams, Attorney General of the State of New York respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because it does not present a conflict among the courts of appeals, or raise questions which have not previously been settled by this Court.

Statement of the Case

Petitioner is a defendant in a state indictment pending in the New York Supreme Court, Albany County. The indictment charges him with two felony counts for intentionally filing a false state income tax return for the tax year 1987, and one

misdemeanor count for failing to file a return for the tax year 1986.[1] Following his acquittal on a 67 count state indictment returned by a New York County Grand Jury, petitioner sought dismissal of the Albany indictment on double jeopardy grounds. He was, however, unsuccessful in the state courts (87a, 69a, 71a).[2]

Thereafter, petitioner sought a writ of habeas corpus from the United States District Court for the Northern District of New York (43a, 44a).[3] The district court (Hon. Howard G. Munson, Sr. Judge), denied the petition, holding that "the pending prosecution of [the] Albany County Indictment. . . .does not violate the Double Jeopardy Clause of the United States Constitution under the standards set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), and *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084 (1990)." (39a, 41a).

The court of appeals affirmed, agreeing that petitioner's "double jeopardy defense is unsupportable under the *Blockburger* test" and that, in light of this Court's "most recent instructions" in *United States v. Felix*, ____U.S.____, 112 S. Ct. 1377 (1992), petitioner's *Grady* argument was unavailing as well. (4a).

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[1] References to the Petition and the Appendix to the Petition are cited as "____", and "____a" respectively, while numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix in the court below.

[2] Petitioner's attempt to appeal directly to the New York Court of Appeals from the denial of his petition for a writ of prohibition was dismissed "upon the ground that no substantial question is directly involved." *Matter of Sharpton v. Turner*, 78 N.Y.2d 1071 (1991). Discretionary leave to appeal was also denied by the same Court. (69a).

[3] Petitioner is presently at liberty, having been admitted to bail by Judge Turner, and therefore, he is "in custody" for purposes of 22 U.S.C. § 2254(a). *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984). Since his argument is based on the double jeopardy clause, he has sufficiently exhausted his state remedies. *Abney v. United States*, 431 U.S. 651 (1977).

Petitioner's motion for reconsideration was denied by the court of appeals on June 29, 1992, as was an application to stay the issuance of the mandate and the trial in Albany County pending this petition. (1a). Petitioner applied to the Hon. Justice Clarence Thomas for a stay of his trial pending the dismissal of the instant petition for a writ of certiorari, or until "such time as this Court decides his appeal." That application was denied on October 5, 1992.

Reasons for Denying the Writ

In affirming the denial of the petition for a writ of habeas corpus, the court of appeals merely applied well-established principles of this Court. *See Grady v. Corbin*, 495 U.S. 508 (1990) and *Ashe v. Swenson*, 397 U.S 436 (1970).

Petitioner's argument is largely based on a misinterpretation of *Grady v. Corbin*, 495 U.S. 508 (1990). He supports his position by arguing that in the Albany County trial, the prosecution will prove some of the same conduct, using the same evidence, for which he was previously prosecuted in New York County. This is precisely the argument rejected only last Term by this Court when it reversed a Tenth Circuit opinion based on the same "extravagant reading of *Grady*". *United States v. Felix*, ____U.S.____, 112 S. Ct. 1377, 1382 (1992). In *Felix*, this Court reiterated that "*Grady* . . .disclaimed any intention of adopting a ' "same evidence" ' test" and that, accordingly, "a mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Id.*

The *Grady* test, under which a successive prosecution is prohibited if the prosecutor, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted," 425 U.S. at 521, is not implicated in this case at all. While some of the same evidence presented in New York County will be offered in the Albany trial, the prosecution will not prove conduct which constitutes an offense for which petitioner has already been prosecuted in order to establish the crimes charged.

For example, throughout the prosecution of petitioner, the respondent Attorney General has consistently stated an intention to "establish defendant's obligation to file a 1986 return and the falsity of his 1987 return based upon income he earned from his business activities and *not by means of any of the crimes charged in the New York County Indictment*". (JA-58) (emphasis added). While petitioner is completely in error in his contention that he was charged in the New York County case with having illegally obtained money "from concert and record promotion activities" (17) it would make no difference under *Grady* were he correct. Although tax crimes cannot be committed without predicate income-producing activity, they are separate in law from criminal offenses that happen to produce income. Acts that generate income, whether laudable or criminal, do not necessarily give rise to tax-related offenses. Nor are many acts of concealment of income, such as those allegedly engaged in by this appellant, illegal in themselves.[4]

Tax crimes require separate, distinct courses of conduct, such as the making of false statements in returns or willful failure to file. They must be shown, moreover, to be motivated by an intent to evade that is distinct from the criminal purpose of income-producing crimes such as larceny or scheme to defraud. Consequently, a prosecution for unlawful acts by which a defendant has obtained money does not create a double jeopardy bar to subsequent prosecution for failing to report that income on a tax return. *United States v. Jacobson*, 547 F.2d 21, 24 (2d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

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[4] The bill of particulars in New York County alleged that the Scheme to Defraud charged in Count One of the indictment included appellant's use of "the bank accounts of National Youth Movement, Inc. to conceal from State tax authorities personal income he earned from his business activities in the field of entertainment and music promotion." (99a). As the court below found, "[e]ven if such conduct is a state offense, it was not the conduct for which Sharpton was prosecuted but, at most only a predicate for the scheme to defraud with which he was charged." (28a) Moreover, as the Appellate Division found, that conduct does not constitute any of the crimes charged in the Albany County indictment, *Sharpton v. Turner*, 170 A.D.2d 43, 46 (3d Dept. 1991).

In an attempt to show that the court of appeals' decision is contrary to precedent of this Court, petitioner relies on *Ashe v. Swenson*, 397 U.S. 439 (1970). *Ashe* involved the doctrine of collateral estoppel, which operates through the double jeopardy clause to preclude relitigation of an issue already resolved in a defendant's favor in prior proceedings. One who seeks to raise collateral estoppel, however, must demonstrate not merely that evidence will be presented a second time, but that a fact or facts necessarily determined in the first trial, constitute elements of the offenses to be tried in the second. *Dowling v. United States*, 493 U.S. 342 (1990); *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992); *United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988). The defendant in *United States v. Jacobson*, 547 F.2d 21 (2d Cir. 1979), *cert. denied*, 430 U.S. 946 (1977) for example, argued that his acquittal of extortion estopped the government from proving in a subsequent trial his evasion of income tax on the interest from the allegedly extortionate loans. The Second Circuit, however, noted that the jury in Jacobson's first trial could have acquitted him because of a failure of proof regarding extortion, and not because of any failure to prove the existence of the loans and defendant's receipt of interest payments. Accordingly, the earlier verdict did not bar the government from proving the loans at the second trial.

Unlike in *Ashe*, the criminal conduct for which petitioner is to be tried in Albany County is not the same as that for which he has already been tried. Nor are there issues raised by the Albany County prosecution that were determined by the verdict in his trial in New York County. The New York County indictment charged that petitioner intended to defraud the State and City of New York as two of the more than ten required victims of Count One, charging Scheme to Defraud in the First Degree. *See* N.Y. P.L. § 190.65(1). Evidence that petitioner deposited monies he received as a record and concert promoter into the National Youth Movement account was presented in support of the charge in Count One that he schemed to defraud the State and City of New York, by showing that he hid business income. Petitioner's business activities generally were introduced to show that appellant had a personal financial interest in

operations of the National Youth Movement. The New York County indictment did not allege, nor did the prosecution attempt to prove, any illegality with respect to petitioner's music business activities. The verdict of the New York County jury is inconclusive with respect to whether appellant intended to evade taxes by means of the scheme to defraud charged in Count One. The jury could have found, for example, that appellant intended to defraud the State and City, but that he did not intend to defraud enough of the other alleged victims to prove the crime of scheme to defraud.

Contrary to petitioner's contention, there is no "conflict" among the circuits as to the "reach" of *United States v. Felix*, ____U.S.____, 112 S. Ct. 1377 (1992). The decision below, while recognizing that the precise holdings of *Felix* have "little bearing on [petitioner's] claim" (19a), and "of little pertinence to our case" (21a), simply found that *Felix* "offer[ed] some illumination of [the Supreme Court's] thinking as to the proper application of *Grady*," (19a) and that its "discussion [of these issues] is significant." (21a).

Without discussing the *Grady* issues clarified by *Felix*, petitioner contends that the court of appeals "extended" *Felix* in supposed contradiction to other circuits which have ostensibly "limited its application to cases involving conspiracies and continuing criminal enterprises". (55) The cases petitioner relies upon, *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992) and *United States v. Smith*, 963 F.2d 892 (6th Cir. 1992) indeed discuss *Felix* only in terms of the applicability of *Grady* to cases involving "multilayered conduct" simply because that is the only issue raised in those cases. *See McHan*, 966 F.2d at 140; *Smith*, 963 F.2d at 894. *See also United States v. Elroy*, 968 F.2d 1143, 1145-6 (11th Cir. 1992).

In *Felix* itself, the Court specifically "caution[ed] against 'ready transposition of the "lesser included offense" principles of double jeopardy . . . to the multilayered conduct, both as to time and to place, involved in [continuing criminal enterprise (CCE)] prosecutions.' " 112 S. Ct. at 1385, quoting from *Garrett*

v. *United States*, 471 U.S. 773, 789 (1985). Recognition of this point by the courts of appeals does not undermine this Court's description of *Grady* as simply extending the prohibition against the prosecution of a lesser included offense established by *Blockburger* to a "species of lesser included offense". *Felix*, 112 S. Ct. at 1384.

There is no conflict among the circuits about the application of *Felix* to cases involving substantive offenses such as the present one. The only reported case from a federal court of appeals discussing *Felix* in the context of a double jeopardy argument against a prosecution for a substantive offense based upon a previous prosecution for a substantive offense is *Prince* v. *Lockhart*, 971 F.2d 118 (8th Cir. 1992). In *Prince*, habeas corpus was sought by a prisoner convicted of burglary and the underlying theft of property (pharmaceutical drugs) at a trial which followed his acquittal for possession with intent to deliver and simple possession of drugs identified as those taken during the same burglary. *Id.* at 120.

Prince is, therefore, directly on point. In that case, the Court of Appeals also cited *Felix* in reiteration of this Court's rejection in *Grady* of a "same evidence" test. *Id.* at 123. The Eighth Circuit rejected the double jeopardy argument and a collateral estoppel argument, finding that there was evidence to prove the elements of the burglary charge beyond that constituting the crimes for which *Prince* was acquitted. *Id.* Similarly, the *Prince* court found collateral estoppel did not apply since the second prosecution did not require proof of the commission of the possession crimes in order to establish the burglary or theft charges. *Id.* Accordingly, there is no conflict with the decision in this case which requires resolution by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Dated: New York, New York
October 28, 1992

Respectfully submitted,

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